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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. ~~1083~~ 129

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
a corporation, Petitioner,

v.

JOHN R. CARNEY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Pittsburgh & Lake Erie Railroad Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on March 27, 1963.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania was not reported. The opinion of the United States Court of Appeals for the Third Circuit is not yet reported. Both are appended hereto, Appendix A.

JURISDICTION

The judgment sought to be reviewed was dated and entered on March 27, 1963.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In operating a restaurant and hotel whose clientele consisted almost entirely of railroad workers and which was located on property leased to it rent-free by a railroad, (but in a settled area where similar accommodations were available in motels and rooming houses) was a Y.M.C.A. carrying out an "operational activity" of the railroad?

STATUTE INVOLVED

The Act of April 22, 1908, c. 149, § 1, 35 Stat. 65; as amended by the Act of August 11, 1939, c. 685, § 1, 53 Stat. 1404, which provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or,

in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (45 U.S.C. § 51).

STATEMENT OF THE CASE

In this Federal Employers Liability Action, the plaintiff was awarded damages for injuries suffered when, sleeping and off duty, he fell out of bed at the Y.M.C.A. at Campbell, Ohio.

The trial court charged the jury that the plaintiff was in the course of his employment while sleeping at the "Y" and that his railroad employer, the defendant, was responsible as a matter of law for any negligence of the employees of the Y.M.C.A. in making up the bed on which plaintiff had been sleeping.[1] Consequently, the jury's verdict for the plaintiff reflected no decision by it on the root questions of scope of employment or the independent contractor status of the Y.M.C.A.

On appeal, after refusal of defendant's motion for judgment n.o.v., the Court of Appeals for the Third Circuit (per Circuit Judge Gerald McLaughlin and District Judge Edward Dumbauld) affirmed the judgment for plaintiff. Judge William H. Hastie dissented.

In the opinion of the majority, the court below held, among other things, that in operating its dormitory and restaurant, the Y.M.C.A. was performing "part of the Pittsburgh & Lake Erie's operational activities and therefore the Y.M.C.A. is to be treated in this instance as the agent of the railroad within the meaning of the F.E.L.A." It was on this point that Judge Hastie dissented. It is this question which petitioner seeks to have reviewed by this Court on writ of certiorari.

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1. The evidence was that the bed had been made up with two mattresses, the top one of which was wider than the bottom one, creating an "over lap" which caused the plaintiff to roll out of bed while asleep.

Statement of the Case.

The facts relevant to this question are the following:

Plaintiff, a communications lineman, had been assigned to a project at defendant's yard near Youngstown, Ohio. Since plaintiff lived and had his headquarters in Pittsburgh, defendant had the choice under its labor contract of transferring plaintiff to Youngstown and requiring him to pay his own expenses there or it could leave his headquarters in Pittsburgh and pay his expenses at Youngstown. Defendant chose the latter course and arranged for plaintiff to stay at the railroad Y.M.C.A. at Campbell, Ohio. (2a, 3a, 5a) Plaintiff lived there during the week, eating two meals a day at the Y.M.C.A. restaurant and taking out a lunch supplied by the "Y". He went home to Pittsburgh on weekends. This routine was followed for several months prior to the date of the accident.

The Y.M.C.A. in Campbell, Ohio, (the full corporate name of which is "Pittsburgh & Lake Erie Railroad Young Mens Christian Association") is what is known as a "railroad Y.M.C.A." (14a) This is one of the traditional areas in which Y.M.C.A.'s conduct their activities. There are about 115 such Y.M.C.A.'s throughout the United States, through which this well-known charitable organization provides lodging, recreation, and religious and educational activites for railroad workers away from home (18a, 22a-24a).

The railroad Y.M.C.A. at Campbell, Ohio, was incorporated by the State of Ohio as a charitable corporation more than 50 years ago and since its incorporation it has operated a hotel and restaurant, on premises owned by the defendant, but occupied by the Y.M.C.A. almost from the beginning of the twentieth century. (17a, 20a)

Neither membership in the "Y" nor the use of its facilities is restricted to employees of the defendant, nor indeed to railroad workers. However, most of the members are in fact employees of the defendant. (17a, 18a) The facilities are used almost exclusively by employees of the defendant; but in the great majority of cases, such use is at the cost and expense of the individual member and not at the cost of their employer. (20a-21a).

The income of the Y.M.C.A. is derived principally from room rent, meals and other charges paid for by the workers who use the facilities. Only a small part of these charges are paid for—directly or indirectly—by the railroad, although it does provide a monthly subsidy of $600 to help the "Y" defray expenses and the Y.M.C.A. pays no rent or other fee for the use of the railroad's building and equipment. (15a, 21a, 25a).

Operational control of the Y.M.C.A. is vested in a Board of Directors and in a general secretary who is a Y.M.C.A. employee and who is in charge of its day to day activities. (14a, 25a, 28a) The restaurant and hotel of the Y.M.C.A. at Campbell, Ohio, is similar to those familiar facilities at which inexpensive meals and accommodations are made available to the general public in many places throughout the nation. In its operation, the Y.M.C.A. employes about 15 persons as cashiers, waitresses, cooks, janitors, chambermaids, bookkeepers, etc. All of these persons are employees only of the Y.M.C.A. (19a).

REASONS FOR GRANTING WRIT

The decision of the Court of Appeals is in conflict with the controlling principles of law as declared by this Court in *Sinkler v. Missouri Pacific Railroad Co.*, 1958, 356 U.S. 326, rehearing denied 356 U.S. 978 and *Ward v. Atlantic Coastline Railroad Co.*, 1960, 362 U.S. 396.

A second reason for granting the writ is the need for clarification which exists (as evidenced by the disagreement between Judges McLaughlin and Hastie, for example,) concerning the proper application of the tests of agency declared in *Sinkler*. See also *Payne v. Baltimore & Ohio RR Co.*, 6th Cir. 1962, 309 F.2d 546; *Copeland v. St. Louis San Francisco Railroad Co.*, 10th Cir. 1961, 291 F.2d 119. In *Sinkler*, this court held that a railroad may be liable, under the F.E.L.A., to compensate its employees in damages for injuries resulting from the negligence of one who, by common law tests, was an independent contractor. It pointed out that an exception to the general rule of *respondeat superior*, which would ordinarily insulate the railroad from liability in such a case, existed when a railroad engaged an independent contractor "to perform operational activities required to carry out the franchise." 356 U.S. at 328. In *Ward*, this court intimated that its reference to this exception in *Sinkler* was not merely dictum, and that the liability of a railroad for the acts or omissions of an independent contractor would be declared, ordinarily, only where the railroad had delegated to the contractor "operational activities *required to carry out the franchise* of the railroad." 362 U.S. 397 (Emphasis added). At least lower federal courts have generally assumed that *Ward* put such a gloss on *Sinkler*: *Mazzucola v. Pennsylvania Rail-*

road Co., 3rd Cir., 1960, 281 F.2d 267, 270; *Garrett v. Southern Rwy.*, E.D. Tenn. 1959, 173 F.Supp. 915, 918-19, aff'd. 6th Cir., 1960, 278 F.2d 424, cert. denied, 364 U.S. 833.

In *Sinkler*, this court also emphasized that the word "agents" in the F.E.L.A. must be given an interpretation broad enough to accommodate it to the purposes of the Act. As stated in the opinion of the court, by Mr. Justice Brennan, 356 U.S. at 330:

> ". . . [J]ustice demands that one who gives his labor t the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuits will conduct themselves in all respects with sufficient care that his safety while doing his p[illegible]t will not be endangered."

Under this test, all persons engaged with the railroad in its "total enterprise" may be treated as its employees or agents, for purposes of distributing the burden of injuries suffered by those engaged in the enterprise.

Neither the common law exception nor the broad interpretation prescribed in *Sinkler* and *Ward*, justify the decision of the court below. The conduct of a restaurant and hotel for its employees and others is not an activity required of a railroad to carry out its franchise, at least in an area where such accommodations are otherwise available.

Nor, by any reasonable test, can it be held that a Y.M.C.A., engaged in its familiar activities of furnishing low cost housing and meals at its restaurant and dormitories, is engaged with a railroad in a unitary enterprise, merely because the railroad workers are the persons who

benefit chiefly from the charitable interests of the Y.M.C.A. or because these activities are in part supported by financial contributions from the railroad.

There is no canon of interpretation, no purpose of Congress in enacting the F.E.L.A., which would justify or require the conclusion that a railroad worker, off duty and asleep, in a room in a railroad Y.M.C.A. is "combining his exertions in a common pursuit" with the employees of the Y.M.C.A., janitorial and otherwise, who service the room in which he is sleeping.

What "accommodating scope" should be given the word "agents" in the F.E.L.A. is a problem which frequently confronts the lower federal courts. The federal judiciary, litigants and others concerned with the proper scope and application of the F.E.L.A., are in need of more guidance in the solution of this problem than may be gathered from the decisions of this Court in *Sinkler* and *Ward*.

For these reasons, it is respectfully requested that this Court issue a Writ of Certiorari in this case.

CARL E. GLOCK
GILBERT J. HELWIG
Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN R. CARNEY, Plaintiff,
v.
PITTSBURGH & LAKE ERIE RAILROAD COMPANY, a corporation Defendant.

Civil Action
No. 16,997

Opinion

This is an action under the Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq., to recover damages for personal injuries sustained by plaintiff on May 3, 1957, at the Pittsburgh & Lake Erie Railroad Y.M.C.A. at Campbell, Ohio. Plaintiff's claim was that, because the bed in his room was negligently maintained, he sustained injury to his head in a fall from bed and that this injury eventually resulted in disabling epilepsy. The action was tried to a jury which returned a verdict in favor of plaintiff. Defendant has moved for judgment notwithstanding the verdict.

Defendant's first two grounds in support of its motion are as follows:

"1. As a matter of law, the injuries sustained by plaintiff on May 3, 1957 were not sustained in the course of his employment.

"2. As a matter of law the agents and employees of the Y.M.C.A. were not the agents or employees of defendant."

Appendix A.

Plaintiff was a commmunication lineman residing in Pittsburgh and with his working headquarters or station also in Pittsburgh. Prior to the accident defendant assigned plaintiff and other members of his gang to work on a project at its yard near Youngstown, Ohio. Although defendant could have transferred plaintiff to Youngstown and required him to pay his own expenses it decided that plaintiff's station should remain at Pittsburgh and that it would pay plaintiff's living expenses while working on the project away from his station. Defendant made arrangements for plaintiff and his fellow linemen to stay at the Pittsburgh & Lake Erie Railroad Y.M.C.A. at Campbell, Ohio. Plaintiff and other members of his gang slept at the Y.M.C.A. during the workweek, ate two meals a day at its restaurant, and had their lunch packed by Y.M.C.A. employees. Although about 97% -98% of the men who used these facilities paid for them all charges for plaintiff's room and board were billed directly to and paid for by defendant on a monthly basis. At oral argument on its motion, defendant conceded that it would not have paid for or reimbursed plaintiff for his living expenses unless he stayed at the Y.M.C.A. Plaintiff's daily working hours were from 8:00 A.M. to 4:30 P.M. and he was not "on call" at other times.

The Pittsburgh & Lake Erie Railroad Y.M.C.A. at Campbell, Ohio, a separate corporation chartered under the laws of the State of Ohio, is one of 115 "railroad Y.M.C.A.'s" in the United States. The building, equipment and furnishings, including those involved in this case, were owned by defendant. There was no lease of the facilities to the Y.M.C.A. nor any rent paid by it to defendant. The operations of the Y.M.C.A. were super-

vised by a General Secretary employed by the Y.M.C.A. and by a Board of Directors, composed, at the time of the accident, of supervisory employees of defendant, and it received no aid or revenue from the National Council of the Y.M.C.A. About 15 other persons were employed by the Y.M.C.A. to operate its dormitory and restaurant facilities. Defendant made a monthly appropriation of about $600.00 to aid in defraying expenses, although this was sometimes increased or decreased. Without this subsidy the Y.M.C.A. could not stay in business because its rates were not high enough to make it self-supporting. Although its restaurant and dormitory facilities were open to the public, the public was not encouraged to use them. They were used "principally" by defendant's employees, and "occasionally" by employees of other railroads.

In Mostyn v. Delaware, L. & W. R. Co., 160 F. 2d 15 (2 Cir. 1947), plaintiff, a track worker, was housed and fed by the Golden Company under a contract with the railroad in a bunk car" (a railway car fitted up with bunks and standing upon an unused track). Plaintiff's bunk was so verminous that he took his blankets and lay down to sleep near the rail of a nearby track and was injured when struck by a passing train. The dissenting opinion states that "Mostyn was privileged to sleep in the bunk car (and a certain sum was deducted from his wages if he did so) but he was not required to sleep there; he could, if he wished, have rented a room in the nearby village as one of the track crew did." The opinion does not indicate whether the railroad did or did not exercise control and supervision over the bunk car facilities. There is also no indication that plaintiff was "on call" by his employer while housed in the bunk car;

in fact it was contended by the railroad that plaintiff had quit his job on the day of and prior to the accident. The Court held that plaintiff was in the scope of his employment at the time of the accident and stated as follows on pp. 17 and 18:

> "It seems to us that when a railroad provides shelter or food or both for its employees, and they are using the accommodations so provided to prepare themselves for their work, or to rest and recuperate, they must be regarded as in its 'employ'. Unless that is true we are driven back to including only the very work itself with the addition of going to or away from it. While the amendment does not help textually towards a solution, it does impressively disclose an overall purpose to extend the scope of the statute. We think that to implement this purpose we must go at least as far as the facts here before us; and we hold that, had Mostyn been sleeping in one of the 'bunk cars', he would have been in the 'employ' of the railroad. If so, the fact that he was driven out because the cars were unfit for sleeping, made it reasonably foreseeable that he would seek a substitute; and a jury might find a nearby bed on the earth such a substitute on a hot August night."

In Casso v. Pennsylvania Railroad Company, 219 F.2d 303 (3 Cir. 1955), the Court cited Mostyn v. Delaware, L. & W. R. Co., supra, and stated: "We think that case was right and we follow it.".

In view of these principles this Court is of the opinion that the living accommodations were "provided" by defendant as an incident of plaintiff's contract of em-

ployment the same as if it had provided a "bunk house" and that plaintiff was in the scope of his employment at the time of the accident.

In connection with the second ground of its motion, defendant contends that as a matter of law it was not responsible for negligence in the maintenance of the sleeping facilities at the Y.M.C.A. As stated above, plaintiff's living quarters were furnished to him by defendant as an incident of his employment. Defendant owned the building and all equipment including the bed involved in this case and the Y.M.C.A. used them on a rent-free basis, operating almost entirely for the use and benefit of defendant's employees. Defendant subsidized the normal running expenses on a monthly basis. Without this subsidy the Y.M.C.A. could not have continued to operate; as a result of the subsidy, its rates were kept at a reduced level for the benefit of defendant's employees. The Board of Directors which supervised the Y.M.C.A.'s operations was composed of defendant's supervisory employees. Under these circumstances it cannot be disputed that defendant had some measure of control over the operation and maintenance of Y.M.C.A. facilities, whether or not it chose to exercise it. The Court is of the opinion that under these circumstances defendant was responsible for any negligence in the maintenance of the facilities which resulted in the injuries sustained by plaintiff in this case.

Defendant's third ground in support of its motion is as follows:

> "3. The release was effective, as a matter of law, to discharge the defendant from liability arising from the accident of May 3, 1957."

Appendix A.

While at work on May 15, 1957, plaintiff suffered a second injury consisting of a hernia. Defendant denied responsibility for the hernia but agreed to repair it if plaintiff would execute a general release in its favor. Plaintiff signed the release on May 20, 1957 and an operation for the hernia was performed at defendant's expense. Defendant stipulated at the trial that, at the time the release was signed, "although Mr. Carney had had his fall from bed on May 3, 1957, neither he nor the railroad at that time knew or had any real reason to know that he had suffered in that fall (of May 3, 1957) injuries of the sort presented in the testimony in this case", and "that before or at the time he signed the release when it was discussed or considered between him and the railroad, no reference was had or discussed about the fall from bed which had occurred on May 3, 1957." The release, in pertinent part, is as follows:

> "For the sole consideration of the promise to pay all necessary hospital and surgical expenses of my hernia operation to be performed by a surgeon designated by the railroad company received to my full satisfaction from The Pittsburgh and Lake Erie Railroad Company and without any other representation, promise or agreement, written or oral, I hereby release and discharge the said The Pittsburgh and Lake Erie Railroad Company from all claims, demands, grievances and causes of action of every kind whatsoever and including, but without limitation of the foregoing, all liability for damages of every kind, nature or description now existing or which may hereafter arise from or out of injuries and damages, known and unknown, permanent or otherwise, received by me at or near Struthers,

State of Ohio, on or about the 15th day of May, 1957."

The Court held as a matter of law that the release barred any recovery for the hernia but that it did not apply to the injuries sustained in the accident of May 3, 1957.

Defendant has stipulated that at the time the release was signed, the accident of May 3, 1957 was neither discussed nor considered and that neither party knew or had any reason to know that plaintiff had sustained the injuries claimed in this case. In view of this stipulation and of the specific reference in the release to the accident of May 15, 1957, the Court is of the opinion that the release did not apply to the injuries sustained in the accident of May 3, 1957, nor did the parties so intend.

Defendant further contends that although plaintiff may not have known of his injuries in connection with his fall on May 3, 1957 when he signed the release on May 20, 1957, he did learn of the nature of his head injuries in March, 1958, and that by accepting further medical treatment for hernia on May 5, 1958, he ratified the release in its broadest literal sense.

Considering the disparity of the parties and the inadequacy of consideration, such an unwarranted implication would not only permit an unconscionable result but would contravene the obvious intent of the release agreement.

The motion for judgment n.o.v. will be denied.

/s/ HERBERT P. SORG, D.J.

Dated: December 14, 1961.

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,906

JOHN R. CARNEY

v.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
a Corporation, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued October 19, 1962
Before McLAUGHLIN and HASTIE, *Circuit Judges* and DUMBAULD, *District Judge*.

OPINION OF THE COURT
(Filed March 27, 1963)

By McLAUGHLIN, *Circuit Judge*.

In this Federal Employers' Liability action, appellee was injured while asleep and off duty, as a consequence of his fall from a negligently maintained bed in the Pittsburgh & Lake Erie Railroad Young Men's Christian Association in Campbell, Ohio.

Plaintiff, a communcations lineman, was assigned with his gang to work on a project at defendant's yard near Youngstown, Ohio. Since he lived and had his headquarters in Pittsburgh, defendant had the option under

its contract of transferring plaintiff to Youngstown and requiring him to pay his own expenses there or it could leave his headquarters in Pittsburgh and pay his expenses at Youngstown. Defendant chose the latter course and arranged for plaintiff and his gang to stay at the "railroad 'Y'" at Campbell. Plaintiff lived there during the week, eating two meals a day at its restaurant and taking out a lunch supplied by the "Y". He went home to Pittsburgh on weekends. This routine was followed for several months prior to May 3, 1957, the date of the accident.

Initially, we are faced with the question of whether Carney was covered by the provisions of the Federal Employers' Liability Act at the time he fell; was he "employed" within the meaning of § 51.[1] Very nearly on all fours on the point is the case of Mostyn v. Delaware L. & W.R.R., 160 F.2d 15 (2 Cir. 1947). Mostyn involved a track worker who was housed and fed in a "bunk car" by a third party that was under contract with the railroad. Because of the verminous condition of his bunk plaintiff took his blankets and slept outside near the track, where he was subsequently struck by a passing train. The opinion indicates that although the plaintiff Mostyn was privileged to sleep in the bunk car (at his own expense), he could also, if he wished, have slept in other accommodations available in the town. Although the contention of the railroad that plaintiff had quit his job prior to the accident was not accepted, apparently

1. Section 51 provides in pertinent part:
"Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * *."

he was not "on call". The court held that the function of housing and feeding the plaintiff under these circumstances was one of those activities "which though literally not part of the work, are necessary to its performance" and stated, 160 F.2d at 17-18:

> "It seems to us that when a railroad provides shelter or food or both for its employees, and they are using the accommodations so provided to prepare themselves for their work, or to rest and recuperate, they must be regarded as in its 'employ' ".

We later approved of the principles laid down in Mostyn in Casso v. Pennsylvania R.R., 219 F.2d 303 (1955), where plaintiff was hit by a passing train while walking back to his bunk house from a day off.

The facts here are, in some respects, stronger than those in Mostyn and Casso. Plaintiff's expenses at the Y.M.C.A. were billed directly to defendant and paid on a monthly basis. There was conflicting testimony as to whether plaintiff, in the period prior to his accident, was free to live in other accommodations having rates similar to those of the "Y" and be reimbursed therefor by the railroad. Apparently at oral argument before the district court on its motion for judgment n.o.v. defendant conceded that it would not have paid or reimbursed plaintiff for his living expenses unless he stayed at the "Y". In any event, we have the essential common elements of Mostyn and Casso in that defendant provided plaintiff with shelter and food, which by custom and the economic realities of the situation he and his work group were encouraged to use. The case clearly comes within the framework of Mostyn and is in harmony with those

decisions which have found related activities to be "necessarily incident" to one's employment.[2]

Our second problem is whether the trial court correctly ruled under the facts that the "* * * defendant was responsible for any negligence in the maintenance of the facilities which resulted in the injuries sustained by the plaintiff in this case." The railroad had sent Carney and seven other of its communication linemen specially from Pittsburgh to Campbell, Ohio for the purpose of "* * * putting a new job down there, a big job." Carney's particular work was "stringing cable". The task was intended to last for some period of time; "this wasn't a temporary job". As the trial judge stated in his opinion: "Although defendant could have transferred plaintiff to Youngstown and required him to pay his own expenses it decided that plaintiff's station should remain at Pittsburgh and that it would pay plaintiff's living expenses while working on the project away from his station. Defendant made arrangements for plaintiff and his fellow linemen to stay at the Pittsburgh & Lake Erie Railroad Y.M.C.A. at Campbell, Ohio. Plaintiff and other members of his gang slept at the Y.M.C.A. during the work-week, ate two meals a day at its restaurant, and had their lunch packed by Y.M.C.A. employees. Although about 97%-98% of the men who used these facilities paid for them all charges for plaintiff's room and board were billed directly to and paid for by defendant on a monthly basis. At oral argument on its motion defendant conceded that it would not have paid for or

2. E.g., *Atlantic Coast Line R.R. v. Smalls*, 216 F.2d 842, (4 Cir. 1954); *Lukon v. Pennsylvania R.R.*, 131 F.2d 327 (3 Cir. 1942); *Virginia R.R. v. Early*, 130 F.2d 548 (4 Cir. 1942); *Atlantic Coast Line R.R. v. Meeks*, 30 Tenn. App. 520, 208 S.W.2d 355 (1947).

reimbursed plaintiff for his living expenses unless he stayed at the Y.M.C.A. Plaintiff's daily working hours were from 8:00 A.M. to 4:30 P.M. and he was not 'on call' at other times."

The situation regarding the Y.M.C.A. and its relationship to the railroad need not be detailed. Regarding this the district court stated "Under these circumstances it cannot be disputed that defendant had some measure of control over the operation and maintenance of Y.M.C.A. facilities, whether or not it chose to exercise it." There is a lot to be said for this position but we prefer to base our decision primarily upon the proposition that plaintiff's residence and lodging at the Y.M.C.A. was part of the operational activities of the railroad; that the Y.M.C.A. in supplying those services to plaintiff by arrangement with the railroad, was performing operational activities of plaintiff's employer and in that capacity was an agent for the employer in accordance with Section 1 of the Employers' Liability Act. (45 U.S.C.A. § 51). Carney, when he fell, was in his room at the Y.M.C.A. where he was staying. He was there under the specific agreement with his employer that he would retain his out of town status and that the railroad would pay for his living expenses. As we have seen under the settled Mostyn, Casso principle, Carney was in the course of his employment when he was hurt. And under Sinkler v. Missouri Pacific R.R., 356 U.S. 326 (1958) the negligence of the Y.M.C.A. (found by the jury responsible in whole or part for the accident) was the negligence of its principal, the defendant railroad. In Sinkler the plaintiff was an employee of the defendant Missouri Pacific Railroad. He was working on one of the latter's

cars while it was being switched by a crew of the Belt Railway in the Union Station at Houston, Texas. The car collided with another car in the station through the fault of the switching crew and plaintiff was injured. The switching railroad was organized by the Missouri Pacific and other rail carriers running into Union Station. They owned the Railway's stock and were represented on the Board of Directors in proportion to their holdings. Missouri Pacific owned half the stock and designated one-half of the directors. The Railway received some income from non stockholding carriers but the carrier stockholders otherwise shared the net expense of its operations according to an agreed formula. The Railway employed its own switching crews and other personnel and owned and operated the facilities and rolling stock used in the switching operations. The Supreme Court held, 356 U.S. 331-32:

> "In the present case the respondent, rather than doing the necessary switching incident to its business in the Houston Terminal area, arranged that the Belt Railway should supply the crews and equipment to perform this operation on its behalf. But the evidence clearly establishes that the respondent's trains, when under the control of the Belt Railway's switching crews, were being handled to further the task of the respondent's enterprise. While engaged in switching and handling respondent's cars and trains about the terminal area, the Belt Railway employees on the job were, for purposes of the FELA, as much a part of the respondent's total enterprise as was the petitioner while engaged in his regular work on the respondent's car.

"It is manifest that the corporate autonomy of the Belt Railway, and its freedom from detailed supervision of its operations by respondent, are irrelevant inasmuch as the switching crew of the Belt Railway Company at the moment of the collision in the station was engaged in furthering the operational activities of respondent. We therefore hold that when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of § 1, of FELA."

Ward v. Atlantic Coast Line R. Co., 362 U.S. 396 (1960) reaffirmed the Sinkler doctrine. There the plaintiff was employed by the railroad as a laborer in a section gang with a regular work week from Monday through Friday. On a Saturday, his day off, he with others of his gang worked for a customer of the railroad, a private concern, repairing the railroad siding into its property. The customer was bound to make the repairs at its own expense under its agreement with the railroad. Through the gang foreman, it hired the gang at overtime wages which the foreman paid the men with funds supplied him by the customer. Plaintiff was hurt during the work. The Supreme Court held pages 397, 398:

"This was not a situation, as in Sinkler, in which the railroad engaged an independent contractor to perform operational activities required to carry out the franchise. This was a siding privately owned by the Turpentine Company and established to service it alone. In maintaining it, we do not see how it

can be said under the proofs that the Turpentine Company was 'engaged in furthering the operational activities of respondent.'"

Baker v. Texas & P. R. Co., 359 U.S. 227, 229 (1959) indicates strongly that in the kind of situation before us where the employment relationship at the time of the accident was controverted "An issue for determination by the jury was presented. 'The very essence of * * * [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 35."

Leek v. The B. & O. R. Co., 200 F. Supp. 368 (N.D. W. Va. 1962) is the latest reported decision we have found which follows Sinkler. It presents a close factual parallel to this appeal. Employees of the B. & O. railroad, after completion of their day's work as a switching crew were being transported in a taxicab from where they had been employed to the railroad yard twelve miles away. That transportation was part of a shuttle arrangement between the railroad and the cab company for which the latter was paid by the railroad on a monthly arrangement. During the trip the taxicab went off the road, struck a pole and overturned. Plaintiff was injured. The accident occurred through the fault of the cab driver. Regarding the operational activity point involved the court held pages 370, 371:

"Certainly, there must be many services performed by others under contract with a railroad, which are incidental or even necessary to the corporate purposes of the railroad, which are not 'operational activities' within the meaning of those words as employed in the Sinkler case. Just where the

line should be drawn, I am neither prepared nor called upon to specify. However, I do not believe that the line should be drawn short of the activities which the taxicab company was performing for the railroad in this case.

* * *

"The obligation of the railroad to its employees created by the F.E.L.A. is imposed (in the words of the opinion in the Sinkler case), 'not because the employer is himself to blame, but because justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered.' One may quarrel with the congressional policy, as found and determined by the Supreme Court, in shifting the burden of economic loss caused, in whole or in part, by the negligence of someone acting in furtherance of the railroad's enterprise, from the individual to the enterprise, but the trend of the Court's decisions is too clear for this district court to disregard it."[3]

3 *Mazzucola v. Pennsylvania Railroad Company*, 281 F.2d 267 (3 Cir. 1960) in no way attempts to restrict the principle formulated from the above quoted decisions. On the phase of it in which we are interested it merely holds that under its particular facts p. 270 "* * * summary judgment is inappropriate." Here, the factual situation was fully developed at the trial. *Garrett v. Southern Railway*, 175 F. Supp. 915 (E.D. Tenn. 1959), aff'd. 278 F.2d 424 (6 Cir. 1960), cert. den. 364 U.S. 833 (1960), was a control case in which the trial court concluded from the facts p. 920 "* * * that the control of Southern over Lenoir was not such as to constitute the latter an adjunct of Southern." As the Sixth Circuit pointed out in *Cimorelli v. New York Central R. Co.*, 148 F.2d 575, 577 (1945), regarding this type of litigation "Each case must be decided on its peculiar facts and ordinarily no one feature of the relationship is determinative."

What we have here is that the lodging of Carney at the railroad Y.M.C.A. was an integral part of the Pittsburgh & Lake Erie's particular and important project in the vicinity. By that means the railroad made sure that Carney was on location and readily available during the period of the Campbell undertaking. The railroad handled Carney's board and lodging through the Y.M.C.A. "* * * to further the task of [its] enterprise." And it was just as much a part of that enterprise as when Carney was actually stringing cable, for it put him in Campbell and kept him there to do that phase of the work. What he did was no separate engagement of the Y.M.C.A. as was the situation regarding the Turpentine Company in Ward, supra. In this instance it was solely Pittsburgh & Lake Erie construction, alterations or repairs which were involved and for which his employer wanted Carney to be and remain at the scene. That objective under the facts was fully as much a part of the Campbell project as was the transportation of employees to and from their job in Leek, supra.

Even under common law there is substantial authority, as the Supreme Court states in Sinkler, supra p. 329, which "* * * supported recovery by the railroad employee from his employer for injuries caused by the fault of employees of an independent contractor performing a part of the employer's railroad operations." But as that opinion firmly holds there is no need of relying on those principles where, as in this suit, we are governed by the F.E.L.A. whose "* * * broad purpose controls our decision in determining whether the Belt Railway and its switching crew were 'agents' of the respondent within the meaning of the section. Plainly an accommodating scope must be given to the word 'agents' to give vitality

to the standard governing the liability of carriers to their workers injured on the job." pp. 330, 331.

From all of the above, in our view, the service the Y.M.C.A. performed for the railroad in taking care of Carney was part of the Pittsburgh & Lake Erie's operational activities and therefore the Y.M.C.A. is to be treated in this instance as the agent of the railroad within the meaning of the F.E.L.A.

Appellant also contends that the release given by plaintiff to defendant is a bar to his action. There is no need of discussing this point at any length. We agree completely with the district court that the document did not apply to the injuries sustained in the accident of May 3, 1957 (the one before us) and that plaintiff's acceptance of further medical treatment for his earlier hernial condition after he had executed said release did not ratify it so as to include within it the accident before us.

The judgment of the district court will be affirmed.

HASTIE, J., *Dissenting.*

Essential to the majority decision is the conclusion that a Young Men's Christian Association, in furnishing lodging to employees of the defendant railroad, acted as an "agent" of the railroad within the meaning of section 1 of the FELA.[1] Otherwise, the railroad could not be held liable for negligence of the Y.M.C.A. in improperly

[1] The section reads, in relevant part, as follows:

"Every . . . railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . ." 45 U.S.C. § 51.

making up the bed from which plaintiff fell in his sleep.[2] I am unable to agree that the Y.M.C.A. was the railroad's "agent", as that term is used in the controlling statute.

The leading case is *Sinkler v. Missouri Pacific R.R.*, 1958, 356 U.S. 326, *rehearing denied*, 356 U.S. 978. There the Supreme Court held that section 1 of the FELA has created a statutory conception of agency broad enough to include "others performing, under contract, operational activities" of the railroad. 356 U.S. at 331. The key phrase is "operational activities". The Court viewed the statute as "a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." 356 U.S. at 329. The phrase "operational activities" seems to have been used by the Court to describe the area within which these characteristic "risks inherent in railroad work" are experienced. Under this rationale, the switching of the defendant's car at a railroad station, which the negligent third person was performing in the *Sinkler* case, was obviously an "operational activity" of the defendant's railroading. By the same token, the providing of sleeping accommodations for off-duty railroad men seems to be the type of collateral activity which may facilitate railroading but is not "operational" in character.

This has been made clearer by the more precise articulation in *Ward v. Atlantic Coast Line R.R.*, 1960, 362 U.S. 396, where a third person maintaining a privately owned siding was held not to be engaged in an "operational activity" of the railroad and, hence, not to

2. The trouble seems to have been that a broad mattress, inappropriately placed on top of a narrow mattress, tilted when the occupant turned in his sleep.

be an agent of the railroad within the meaning of the statute. In *Ward*, the Court added significant words to the key phrase, limiting the special agency concept to independent contractors performing "operational activities required to carry out the franchise" of the railroad. 362 U.S. at 397. Actually, this very phrase was used by Mr. Justice Brennan in *Sinkler* to describe a common-law extension of vicarious liability which exists in some jurisdictions. It is evident from the illustrative cases cited therein that the Court understood that extension as being limited to the actual movement of cars and freight and maintenance of operating equipment.[3] The language used in *Ward* makes explicit that the *Sinkler* doctrine is no broader than this limited common-law extension of respondeat superior. We recognized the restrictive effect of the *Ward* case in *Mazzucola v. Pennsylvania R.R.*, 3d Cir. 1960, 281 F.2d 267, 270 n. 4. *Accord*, *Garrett v. Southern Ry.*, E.D. Tenn. 1959, 173 F. Supp. 915, 918-19, *aff'd*, 6th Cir. 1960, 278 F.2d 424, *cert. denied*, 364 U.S. 833. Any contrary intimation in *Leek v. Baltimore & O.R.R.*, N.D.W.Va. 1962, 200 F. Supp. 368, upon which the majority rely, is, in my judgment, unwarranted. I can find no rationale under which the Y.M.C.A. supplying

3 The cases cited by the Court may be classified as follows:

SWITCHING OPERATIONS: *Floody v. Great Northern Ry.*, 1907, 102 Minn. 81, 112 N.W. 875, *reargument denied*, 102 Minn. 81, 112 N.W. 1081; *Gulf, C. & S.F. Ry. v. Shelton*, 1903, 96 Tex. 301, 72 S.W. 165; *Fort Worth & D.C. Ry. v. Smith*, 1905, 38 Tex. Civ. App. 92, 87 S.W. 371.

MAINTENANCE OF TRACK OR ROLLING STOCK: *North Chicago St. Ry. v. Dudgeon*, 1900, 184 Ill. 477, 56 N.E. 796; *Wabash, St. L. & P.R.R. v. Peyton*, 1883, 106 Ill. 534, 46 Am. Rep. 705; *Story v. Concord & M.R.R.*, 1900, 70 N.H. 364, 48 Atl. 288; *Gulf, C. & S.F. Ry. v. Shearer*, 1892, 1 Tex. Civ. App. 343, 21 S.W. 133.

TRANSFERRING FREIGHT FROM ONE CAR TO ANOTHER: *Burns v. Kansas City, Ft. S. & M. Ry.*, 1895, 129 Mo. 41, 31 S.W. 347.

hotel accommodations can be brought within the conception of a contractor performing an "operational activity" of the railroad, "required to carry out the franchise".

The majority opinion lays some stress upon the character of the injured employee's activity and the fact that the railroad paid the cost of the employee's lodging. But it is the negligent third person who must have been performing an operational activity of the carrier in order to impose liability on the railroad. The nature of the injured workman's activity and the railroad's willingness to pay for his overnight accommodations both go to an entirely separate problem: whether, within the meaning of the FELA, the workman was "employed" at the time of his injury.

Apart from concepts peculiar to the FELA, I think it clear that the so-called "railroad" Y.M.C.A. was not a common-law agent of the defendant railroad. They were separate corporations performing distinct functions. This "Y" was one of more than 100 similar units organized in various parts of the country by the national Y.M.C.A. to provide lodging and recreational, religious and educational activities for railroad workers away from home. The railroad had no authority over the Y.M.C.A. It did not select or appoint the directors or the employees of the Y.M.C.A. It did not supervise or interfere with "Y" activities True, since the Y.M.C.A. served railroad men primarily, the local "Y" directors were railroad employees. But they were not policy making officers of the railroad and there is no indication whatever that the railroad influenced their decisions as Y.M.C.A. board members in any way.

The only other connection of the railroad with the Y.M.C.A. took the form of substantial donations of

money and facilities. But a large donor to such a benevolent organization as a Y.M.C.A. is not for that reason related to the donee as a principal is to an agent. Here again there is no evidence that the railroad used its position as a donor as a means of exercising any control over the Y.M.C.A.

For these reasons I think this court and the court below have erred in holding the railroad responsible for the way in which the Y.M.C.A. made up its beds. The railroad was entitled to judgment n.o.v. in accordance with its appropriate motion at the conclusion of the trial.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

IN THE U. S. DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

JOHN R. CARNEY,
plaintiff
v.
PITTSBURGH & LAKE ERIE RAILROAD CO.,
a corporation,
defendant
C.A. 16997

Order

AND NOW, this 15th day of June 1961, it is ordered that judgment be entered in favor of the plaintiff, John R. Carney, and against the defendant, Pittsburgh & Lake Erie Railroad Company, in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000), together with costs.

/s HERBERT P. SORG, D.J.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,906

JOHN R CARNEY
vs.
PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN and HASTIE, Circuit Judges; and DUMBAULD, District Judge.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF
Clerk

March 27, 1963